

FAILURE OF GRAND JURY FOREMAN TO SUBSCRIBE NAME TO INDICTMENT

Kennedy v. Alvis, 145 N.E.2d 361 (Ohio C.P. 1957)

An Ohio grand jury returned an indictment charging plaintiff with the offense of armed robbery. The accused entered a plea of not guilty and upon trial was convicted and sentenced to the Ohio penitentiary. Subsequently it was discovered that the foreman of the grand jury had failed to sign the "true bill" endorsement. Habeas corpus was granted on the basis that the accused's rights were prejudiced. Held, that the petitioner's substantial rights were prejudiced by not being presented with a "certification by the foreman of the grand jury to the effect that the indictment was found by the grand jury in the manner provided by law."¹

Under both the Constitution of the United States² and the Ohio Constitution³ no person may be held to answer for a capital crime except upon the presentment or indictment of a grand jury. However, a question may arise as to whether an actual indictment has been returned by the grand jury.⁴

Ohio Revised Code section 2939.20 reads as follows:

At least twelve of the grand jurors must concur in the finding of an indictment. When so found, the foreman *shall* indorse on such indictment the words "a true bill" and subscribe his name as foreman. (Emphasis added.)

The precise effect of a foreman's failure to subscribe his name on an indictment has not been harmoniously decided among the various jurisdictions. Courts in Texas have consistently held that the signature of the foreman is not essential to the validity of the indictment.⁵ This is true even when a statute seemingly requires the signature of the foreman.⁶ A succinct statement of the Texas position is found in the case of *Day v. State*,⁷ wherein it is stated:

Article 439 of the Code of Criminal Procedure does set out in detail the requisites of an indictment, and among the other requirements there stated is the following provision: Sec. 9: "It (the indictment) shall be signed officially by the foreman

¹ *Kennedy v. Alvis*, 145 N.E.2d 361 (Ohio C.P. 1957).

² U.S. CONST. amend. V.

³ OHIO CONST. art. I(D).

⁴ "The question presented to the court is not whether there is a defect in an indictment but whether there is in this case an indictment." *Kennedy v. Alvis*, *supra* note 1.

⁵ *Hannah v. State*, 1 Tex. App. 578 (1876); *Seary v. State*, 89 Tex. Cr. R. 478, 232 S.W. 319 (1921); *James v. State*, 52 Tex. Cr. R. 21, 105 S.W. 179 (1907). See Annot., 30 A.L.R. 721 (1924).

⁶ TEX. CODE CRIM. PROC. art. 396 (1953).

⁷ 61 Tex. Cr. R. 114, 134 S.W. 215 (1911).

of the grand jury." This article taken alone would seem to indicate that the indictment would be fatally defective if not so officially signed. It will be noted, however, that article 565 of the Code of Criminal Procedure of 1895 directly refers to and expressly limits and controls so much of article 439 as is herein invoked. Article 565, *supra*, is as follows:

"Exceptions to the form of indictment or information may be taken for the following causes only: . . . (2) The want of any other requisite or form prescribed by articles 439 and 466, *except the want of the signature of the foreman of the grand jury . . .*" (Emphasis added.)

The decision in the *Day* case, stripped of all other language, turned squarely on the statute. No contention has ever been seriously entertained by the Texas courts that the foreman's signature is essential to a constitutionally adequate indictment. For this reason, the Texas decisions have nothing to offer in the way of a basic argument for, or against, the requirement of a foreman's signature on the indictment.

North Carolina seems committed to a position similar to that taken by Texas; however, the most widely cited decision on the question quite clearly points out that North Carolina has no statute requiring an indictment to be signed by the foreman of a grand jury.⁸ Consequently here again there is no applicable authority bearing on the Ohio problem.

Iowa has also repeatedly refused to set aside a conviction where a defect was claimed because the foreman failed to subscribe his name to the indictment.⁹ Even though Iowa has what appears to be a mandatory statute¹⁰ requiring the signature of the foreman, the courts have consistently regarded the statute as directory only.¹¹

The Ohio Supreme Court has never ruled on the question raised in the instant case. It may be noted, however, that Revised Code section 2939.20 embodies the mandatory phrase "the foreman shall indorse on such indictment the words 'a true bill' and subscribe his name as foreman." In the case of *Coburn v. State*,¹² the Alabama Supreme Court found an indictment to be fatally defective because of the failure of the foreman of the grand jury to properly subscribe his name as prescribed by statute. The same conclusion was reached in *Whitley v. State*,¹³ wherein the court held that "where an indictment is not indorsed 'a true bill,' and signed by the foreman of the grand jury, as required by Code 1907, section 7300, it is not valid." This widely cited case is representative of the position taken in most jurisdictions having a statute similar to Ohio's.¹⁴

⁸ *State v. Avant*, 202 N.C. 680, 163 S.E. 806 (1932).

⁹ *State v. Fisher*, 172 Iowa 462, 154 N.W. 587 (1915).

¹⁰ IOWA CODE ANN. §772.1 (1946).

¹¹ *Waw-Kow-Chaw-Neek-Kaw v. United States*, 1 Morris 332 (Iowa 1844).

¹² 151 Ala. 100, 44 So. 58 (1907).

¹³ 166 Ala. 42, 52 So. 203 (1910).

¹⁴ *People v. St. Clair*, 244 Ill. 444, 91 N.E. 573 (1910); *Johnson v. State*,

Based on the weight of authority alone, it would seem that the *Kennedy* case properly holds invalid an indictment not signed by the foreman of the grand jury. But, habeas corpus might well have been denied had proper steps been taken to amend the indictment. Ohio has a statute of broad import which provides that the court may at any time before, during, or after the trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.¹⁵ This statute has been held constitutional even to the extent of permitting the amendment of an indictment during trial to show venue, where the offense was sufficiently described.¹⁶ In the case of *Pierpont v. State*,¹⁷ the court held that it did not prejudice the defendant to permit the amendment of an indictment for murder by indorsing thereon the words "a true bill" where the foreman of the grand jury inadvertently failed to write these words over his signature. Under the provisions of Revised Code section 2939.20, it is just as mandatory that the indictment be indorsed "a true bill" as it is that the foreman of the grand jury subscribe thereon his name. The absence of one can be no more prejudicial than the absence of the other.

It is submitted that the indictment in the instant case served its primary function of informing the defendant of the charge and accusation he need defend against.¹⁸ Having done this, there would appear to be no reason why the judge could not have taken steps to secure the signature of the foreman of the grand jury. As paragraph four of the syllabus in *United States v. Long*¹⁹ states:

Failure of foreman of Grand Jury which voted a true bill against defendant to sign the bill, because of inadvertence, related to a merely ministerial act, which could be supplied by foreman in open court and in the presence of the Grand Jury, and such procedural defect did not warrant a dismissal of the indictment.

Such a solution would be in line with the modern trend of our legislation and jurisprudence which is aimed at preventing an accused from defeating justice by pleading technicalities that are not in any way harmful or prejudicial to his rights.²⁰

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23 Ind. 32 (1864); *Goldsberry v. State*, 92 Neb. 211, 137 N.W. 1116 (1912); *People v. Lester*, 267 App. Div. 537, 48 N.Y.S.2d 409 (1944); *People v. Rice*, 185 Misc. 473, 56 N.Y.S.2d 833 (1945).

¹⁵ OHIO REV. CODE §2941.30 (1953).

¹⁶ *Breinig v. State*, 33 O.L.R. 648, 9 Ohio L. Abs. 333 (1930), *aff'd*, 124 Ohio St. 39 (1931).

¹⁷ 49 Ohio App. 77, 195 N.E. 264 (1934).

¹⁸ *People v. Gould*, 237 Mich. 156, 211 N.W. 346 (1926).

¹⁹ 118 F. Supp. 857 (D. Puerto Rico 1954).

²⁰ *State v. Gates*, 27 Ohio L. Abs. 302 (1938).